No. 15406

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MAX SHAYNE and IRVING SHAYNE,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

OPENING BRIEF ON APPEAL.

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Jurisdiction.

Jurisdiction is conferred by Title 28, Section 1291 and Rule 37 of Rules of Criminal Procedure for the District Courts of the United States.

The judgment was rendered in the District Court, notice of appeal duly filed, and time for filing the appeal was duly extended by the District Court, and by this Court, to and including June 25, 1957.

Statutes Involved.

U. S. C. A., Title Sec. 371—*Conspiracy to commit offense or to defraud United States.*

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or

for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more the five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

Sec. 1010. *Federal Housing Administration transactions.*

Whoever, for the purpose of obtaining any loan or advance of credit from any person, partnership, association or corporation with the intent that such loan or advance of credit shall be offered to or accepted by the Federal Housing Administration for insurance, or for the purpose of obtaining any extension or renewal of any loan, advance of credit, or mortgage insured by such Administration, or the acceptance, release, or substitution of any security on such a loan, advance of credit, or for the purpose of influencing in any way the action of such Administration, makes, passes, utters, or publishes any statement, knowing the same to be false, or alters, forges, or counterfeits any instrument, paper, or document, or utters, publishes, or passes as true any instrument, paper or document, knowing it to have been altered, forged, or counterfeited, or wilfully overvalues any security, asset, or income, shall be fined not more than $5,000 or imprisoned not more than two years, or both. June 25, 1948, c. 645, 62 Stat. 751.

The Facts.

This is an appeal from judgments of conviction of two brothers, Max Shayne and Irving Shayne, of conspiracy (count one) to violate Section 1010 of Title 18, United States Codes, and of one brother to cause false statements to be passed, uttered, and published on financial institutions for F. H. A. loans in violation of counts two, three, five, six, seven and nine of the indictment. Each defendant was sentenced to five years on count one (conspiracy). Max Shayne was sentenced to two years on each of the other counts to run concurrently. The alleged offenses took place four years before the trial. The conspiracy charge encompassed the period between June, 1952 and April, 1953.

The Procedure.

The defendants were indicted January 4, 1956 in a multiple indictment—to-wit, nine counts [Cl. Tr. 1-92]. Count one charged conspiracy to obtain loans under Title 12, Section 1703, by means of false and fraudulent written statements which would be made by the defendants and their co-conspirators, which loans would not be made according to the act and regulations.

The indictment charged the conspiracy to begin in June, 1952 and continue until April, 1953, charging that they conspired "together and with other persons, whose names are to the grand jury unknown, * * *."

Demand was made for a Bill of Particulars, requesting, among other things, specifications as to who were the other persons with whom the defendants conspired. [See Clerk's Transcript—Mo. Bill of Particulars, Feb. 15,

1956.] The Government replied, in the few points ordered answered, as follows:

"The government will not contend at the trial that any other persons were co-conspirators with the defendants."

The indictment was sent to the jury room after the jury retired to deliberate [R. Tr. 2424 and 2435]. The court stated "and the entire indictment, excluding the count that has been dismissed, will be sent to the jury room for your use, because it will appear from these instructions you should check portions of it with considerable detail." [R. Tr. 2424.]

The court then read to the jury as part of his instructions:

> "Beginning on or about the month of June 1952 and continuing until the month of April 1953, defendants Max Shayne and Irving Shayne did wilfully and knowingly agree and conspire together and with other persons, whose names are to the grand jury unknown, as follows:" [R. Tr. 2424].

The court did not send the Bill of Particulars to the jury room, nor did he inform the jury that the conspiracy was limited to Max and Irving Shayne by reason of the Bill of Particulars.

Contrary to the Bill of Particulars, the court instructed the jury as follows:

"While it is necessary that there be two or more conspirators, one of the persons on trial can be found to have not been one of the two or more. Now, the case as it has developed here has presented the possibility that many persons other than those on trial might lawfully be found to have been members of a

conspiracy. And if you believe one or the other or both of the defendants were members of such conspiracy, then you could return a verdict of guilty as to each defendant." [R. Tr. 2452.]

The indictment charged the defendants with conspiracy in count one, and with substantive counts in two to nine, inclusive. During his argument the prosecutor said:

> "Now, Ladies and Gentlemen, these substantive counts themselves are the basis of our proof on the conspiracy." [R. Tr. 2293.]

Irving Shayne was acquitted on the substantive counts.

The indictment thus actually, in effect, charged eight little conspiacies, one with each of the applicants for F. H. A. loans, in one grand and general conspiracy count in violation of the rule laid down in *Kotteokos v. United States,* 328 U. S. 750, 90 L. Ed. 1557.

Count two charged causing a false statement to be passed, uttered and published to the Citizens National Trust & Savings Bank in an F. H. A. office about Archie L. and Viola Thompson for $2,395 [Omit Act 5 of count one indictment].

Count three, $1,600 loan application by Henry E. and Martha Green for $1,600 [Omit Act 1 of indictment].

Count four, October 15, 1952 loan application of $800 by Mandell and Moshell Dakes [Omit Act 3 of count one].

Count five charges Max Shayne alone with having caused, on or about October 3, 1952, Eligh S. Moore and Vivian Moore to pass, utter and publish false statements to borrow $1,900 when only $1,600 was to be used for housing repairs; count six charges Max Shayne on or

about September 5, 1952 with having caused David L. Hamilton to apply and receive $1,580 when he intended to use only $700 for the same. Count seven charges Max Shayne on or about July 15, 1952 with having caused Joe Olsen and Leona Olsen to have passed, uttered and published false statements to obtain $1,200 when they intended to use only $1,600 for the purposes set out in the application. Count 8 charged that on or about June 16, 1952 Max Shayne caused H. C. Cooper to pass, utter and publish false statements to the Citizens Bank to obtain $1,400 when they (he) intended only $700 to be used for the purposes set out in the application. Count Nine charged that on or about June 17, 1952 Max Shayne caused Earnest C. Johnson and Flordie Mae Johnson to pass, utter and publish certain false statements in a loan application to the Citizens National Trust and Savings Bank to obtain a loan of $1,300 "with intent to use the entire sum of $1,300 in a manner and for purposes other than as stated in the credit application."

Appellants moved to dismiss the indictment on the ground that it failed to constitute an offense against the United States; also that it violated the Sixth Amendment of the United States Constitution because it was too vague and failed to apprize the accused of the nature and cause of the accusation as required by that Amendment, embracing with reasonable certainty the particulars of time, place, and person. This motion was denied.

Motions were made for a Bill of Particulars under Rule 7 of Criminal Procedure for the District Courts of the United States, and denied as to each count except as hereinafter set out. This bill asked detailed specification as to each count as to: the exact statement or state-

ments alleged to have been made [specification 3 of count one], the times, places, and persons present, the various documents referred to, the names of the co-conspirators, how and in what way sums would be used other than specified in the loan applications, and the exact sums intended to be used and for what purpose. The court ordered the bill granted only as to whether the Government will contend that any other persons were co-conspirators. Paragraphs 2, 6—the names of the persons the defendants allegedly met and assisted in obtaining loans. Paragraphs 8, 10, 11 of defendants' demand for bill as to count one, specifying the documents referred to in that count, the companies the defendants represented as salesmen, and the companies used to share work had been completed. As to all other matters and things, the bill was denied.

Motion for inspection of documents under Rule 17(2) for all documents was denied except as "obtained from these defendants" was granted. In every other respect it was denied [Minutes of March 12, 1956].

A *subpoena duces tecum* to produce all documents, books, papers, objects (except memoranda prepared by Government counsel), including all papers, memoranda, records, solicited by or presented or volunteered to any agency of the Government, was denied.

The trial lasted four weeks, resulting in acquittal of Irving Shayne as to all counts except the conspiracy count —count one. Max Shayne was convicted of counts 1, 2, 3, 5, 6, 7, and 9. Each defendant was sentenced to five years on count 1, and Max Shayne was sentenced to two years on each of the remaining counts, to run concurrently.

Specification of Errors.

I.

THE DEFENDANTS WERE ERRONEOUSLY CHARGED WITH MULTIPLE CONSPIRACIES IN A SINGLE CONSPIRACY COUNT IN VIOLATION OF THE RULE OF KOTTEOKOS V. UNITED STATES, 328 U. S. 750. THIS PROCEDURE DENIED THEM FAIR TRIAL, GUARANTEED BY THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

II.

THE TRIAL COURT ERRONEOUSLY SENT THE INDICTMENT TO THE JURY ROOM DURING THE JURY'S DELIBERATIONS. THE COURT FAILED TO SEND THAT PORTION OF THE BILL OF PARTICULARS TO THE JURY ROOM, WHICH ELIMINATED ALL OTHER PERSONS AS CONSPIRATORS EXCEPT THE TWO DEFENDANTS.

III.

THE TRIAL COURT ERRONEOUSLY INSTRUCTED THE JURY THAT PERSONS OTHER THAN THE DEFENDANTS COULD BE CONSPIRATORS, CONTRARY TO THE SPECIFICATION IN THE BILL OF PARTICULARS.

IV.

THE INDICTMENT FAILED TO STATE AN OFFENSE AGAINST THE UNITED STATES IN THAT IT FAILED TO INFORM THE ACCUSED OF THE "NATURE AND CAUSE" OF THE ACCUSATION, AS REQUIRED BY THAT AMENDMENT.

V.

THE COURT ERRED IN DENYING DEFENDANTS THE BILL OF PARTICULARS IN ALL OTHER RESPECTS, AS REQUESTED. THIS DENIED THE DEFENDANTS AN OPPORTUNITY TO PREPARE FOR THEIR DEFENSE.

VI.

THE COURT ERRED IN REFUSING THE DEFENDANTS THE RIGHT OF FULL INSPECTION OF ALL DOCUMENTS AND REFUSING TO ORDER COMPLIANCE WITH THE SUBPOENA DUCES TECUM.

VII.

TITLE 18, SECTION 1010, UNITED STATES CODE, HAS BEEN UNCONSTITUTIONALLY CONSTRUED AND APPLIED, AND IS INHERENTLY UNCONSTITUTIONAL IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT AS BEING TOO VAGUE, INDEFINITE, AND UNCERTAIN.

VIII.

THE SECTION REGARDING FALSE STATEMENTS REQUIRES THE APPLICATION OF THE TWO WITNESSES RULE, AS IN PERJURY PROSECUTIONS. THE COURT FAILED TO SO INSTRUCT THE JURY.

IX.

THE VERDICTS ARE CONTRARY TO THE LAW AND THE EVIDENCE. THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE VERDICTS.

(a) THE ACQUITTAL OF IRVING SHAYNE ON ALL SUBSTANTIAL COUNTS NECESSARILY ACQUITTED HIM OF THE CONSPIRACY COUNT WHERE THE PROSECUTION RELIES ON THEM TO ESTABLISH THE CONSPIRACY.

(b) SINCE ONLY THE TWO DEFENDANTS WERE SPECIFIED IN THE BILL OF PARTICULARS, ACQUITTAL OF IRVING SHAYNE WOULD REQUIRE ACQUITTAL OF MAX SHAYNE ON THE CONSPIRACY COUNT.

(c) THE STATEMENT, IF FALSE, WAS NOT MADE BY THE DEFENDANT. THE STATEMENT WAS THE INDEPENDENT ACT OF THE LOAN APPLICANT.

(d) THE GOVERNMENT FAILED TO PRODUCE TWO WITNESSES TO EACH ALLEGED "FALSE STATEMENT."

(e) NO EVIDENCE SHOWED THE LOANS WERE ACTUALLY F. H. A. LOANS.

(f) THE GOVERNMENT FAILED TO PROVE FALSITY ON THE DATE ALLEGED.

X.

THE COURT ERRED IN INSTRUCTIONS GIVEN AND REFUSED.

(a) THE COURT ERRED IN INSTRUCTING THE JURY THAT THERE WERE OTHER "CONSPIRATORS" WHEN THE GOVERNMENT HAD LIMITED THE CONSPIRACY TO THE TWO DEFENDANTS.

(b) THE COURT ERRED IN FAILING TO INSTRUCT THE JURY AS TO THE PROVISIONS OF THE BILL OF PARTICULARS.

XI.

THE COURT ERRED IN FAILING TO GRANT JUDGMENTS OF ACQUITTAL ON THE CONSPIRACY COUNT WHEN THE JURY ACQUITTED IRVING SHAYNE OF ALL THE SUBSTANTIVE COUNTS. THERE CANNOT BE A SINGLE CONSPIRATOR.

ARGUMENT.

I.

The Defendants Were Erroneously Charged With Multiple Conspiracies in a Single Conspiracy Count in Violation of the Rule of Kotteokos v. United States, 328 U. S. 750. This Procedure Denied Them Fair Trial, Guaranteed by the Due Process Clause of the Fifth Amendment.

The two defendants were charged with a series of separate and multiple little conspiracies. Each statement in an application for a loan was necessarily a separate conspiracy with the loan applicant and not one grand conspiracy, as charged in count 1. Being a series of alleged little conspiracies, the combination into one conspiracy was contrary to the rule laid down in *Kotteokos v. United States,* 328 U. S. 750.

Like the *Kotteokos* case, this was a case involving F. H. A. loans,. Here, as there, a single person allegedly brought about the loan applications. But each was a separate party, making separate applications. This then, could not be a single conspiracy and was a misuse of the conspiracy statute.

The court in the *Kotteokos* case said the question it had to determine is whether a situation in which one conspiracy only is charged and at least eight having separate, though similar objects, are made out by the evidence, if believed; and in which more numerous participants in the different schemes were, on the whole, except for one, different persons who did not know or have anything to do with one another.

The case here has an analogous situation.

II.

The Trial Court Erroneously Sent the Indictment to the Jury Room During Its Deliberations. The Bill of Particulars Was Not Sent, This Eliminated All Other Persons as Conspirators Except the Two Defendants.

The indictment charged conspiracy with other persons than the two defendants. The government on the Bill of Particulars stated it would not contend that any other persons were conspirators. The indictment is not evidence. The Bill of Particulars limited its scope and the defendants could only be tried within its limits. (*United States v. Adams Express Co.,* 119 Fed. 240. Sending the indictment to the jury room under these circumstances was particularly prejudicial. While we have no case directly in point, we think this necessarily follows on general principle. An indictment is merely the first pleading on the part of the government. It may be based on hearsay or anything the grand jury feels sufficient to accuse a person of crime. Only papers which have been received in evidence should go to the jury room. (*Winters v. United States,* 201 Fed. 845; *Holingren v. United States,* 217 U. S. 509, 54 L. Ed. 861.) The indictment was not offered or received in evidence. Furthermore, it was limited by the Bill of Particulars, Rule 7C. The Bill of Particulars gives the defendant specific notice of what he has to meet on the trial. (*Luess v. United States,* 104 F. 2d 225; *United States v. Dillons,* 101 F. 2d 829; *Filiabreau v. United States,* 14 F. 2d 659; *Glasser v. United States* 315 U. S. 60, 66, 67.)

III.

The Trial Court Erroneously Instructed the Jury That Persons Other Than the Defendants Could Be Conspirators, Contrary to the Specification in the Bill of Particulars.

Since the government by its Bill of Particulars placed the defendant on notice that it would not contend that there were any other conspirators than the two defendants, it was prejudicial error to instruct the jury that other persons could be conspirators. This is like placing a person on trial on a charge not made.

Cole v. Arkansas, 333 U. S. 196, 92 L. Ed. 644;
De Jonge v. Oregon, 299 U. S. 353.

In *Cole v. Arkansas,* 333 U. S. 196 at page 201, the court said:

> "No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, State or Federal."
>
> *Re Oliver,* 333 U. S. 257 at p. 273.

Here the defendant sought by Bill of Particulars to be placed on specific notice of the charge as to whether they were charged with conspiring with other persons and the Government elected by its Bill of Particulars to put them on notice that they would only be charged with conspiring with each other and no one else. They were therefore placed upon a trial upon a charge limited by the Bill of Particulars in effect were not so charged. (See

Cole v. Arkansas, 333 U. S. 196; *Dejonge v. Oregon,* 299 U. S. 353.) When the court instructed the jury therefore that they could be conspirators with other persons [R. Tr. 2452] when the court told the jury "Now, the case developed here has presented the possibility that many persons other than those on trial might lawfully be found members of a conspiracy. And if you believe one or the other or both of the defendants were members of such conspiracy, then you could return a verdict of guilty as to each defendant." The court, in effect, told the jury and placed the defendants on trial on a charge no longer made and specifically limited by the Bill of Particulars. We think this was of such prejudicial error as to require reversal of the judgments below.

IV.

The Indictment Failed to State an Offense Against the United States in That It Failed to Inform the Accused of the Nature and Cause of the Accusation as Required by That Amendment.

The Sixth Amendment to the Constitution of the United States must be read into every proceeding in the Federal Court and that amendment requires notice of the nature and cause of the accusation in the indictment.

Kotteokos v. United States, 328 U. S. 750;

United States v. Debrow, 346 U. S. 374, 98 L. Ed. 92;

United States v. Cruikshank, 92 U. S. 542, 23 L. Ed. 548.

V.

The Court Erred in Denying Defendants the Bill of Particulars as Requested. This Denied the Defendants an Opportunity to Prepare Fully for Their Offense. The Defendants in This Case Moved for a Bill of Particulars at the Beginning of the Case. The Request Was Quite Specific and Detailed and Necessary for the Defendants to Prepare Their Defense. The Court Denied the Motion, in Most Respects, as Requested.

In *United States v. Debrow,* 346 U. S. 378, *Glasser v. United States,* 315 U. S. 60, 66, the United States Supreme Court said: "If the defendants wanted more definite information as to the name of the person who administered the oath to them, they could have obtained it by requesting a Bill of Particulars, Rule 7—Fed. Rules of Criminal Procedure." But in the instant case the defendants did request the more definite information and it was denied, therefore, the defendants were highly prejudiced by this denial.

VI.

The Court Erred in Refusing the Defendants the Right of Full Inspection of All Documents and Refusing to Order Compliance With a Subpoena Duces Tecum.

The right to use the *Subpoena Duces Tecum* to produce documents into court for trial and defense is a basic right and anyone who has possession of these documents is as much required to produce them as any other person. The *Subpoena Duces Tecum* is a method of securing those documents into court for trial and for advance in-

spection of defense counsel. In this case it was highly important to examine the writings and compare them and to determine facts regarding the applications made by the various witnesses for loans. This right, we think, is guaranteed by Rule 1617-C, Federal Rules of Criminal Procedure and Rule 45-B, Federal Rules of Civil Procedure. See *Bowman Dairy Company v. United States,* 341 U. S. 214, as modified by the Supreme Court this term in *Jencks v. United States.*

If the Government declines to produce the documents thus subpoenaed it should be placed in the same position as in the case of *Jencks v. United States,* 23 Decisions of the United States Supreme Court of October Term, 1956.

In *Jencks v. United States,* Mr. Justice Brennan, speaking for the Court said on June 3, 1957:

> "We hold that the criminal action must be dismissed when the Government, on the ground of privilege, elects not to comply with an order to produce for the accused's inspection and for admission into evidence, relevant statements or reports in its possession of Government witnesses touching the subject matter of their testimony at the trial. Accord, *Roviaro v. United States,* 353 U. S. 53, 60-61. The burden is the Governments, not to be shifted to the trial judge to decide whether public prejudice of allowing the crime to go unpunished is greater than that attendant upon the possible disclosure of State secrets and other confidential information in the Government's possession."

By analogy if the Government chose not to produce the documents in its possession which were relevant and the material to the defendants preparation of their trial and chose to stand upon a motion to quash the subpoena, they should be compelled to dismiss the case in this instant and we so move this Honorable Court.

VII.

Title 18, Section 1010, United States Code, Has Been Unconstitutionally Construed and Applied, and Is Inherently Unconstitutional in Violation of the Due Process Clause of the Fifth Amendment as Being Too Vague, Indefinite, and Uncertain.

A statute to be constitutional must not be vague and indefinite.

Jordan v. De George, 341 U. S. 223;

Williams v. United States, 341 U. S. 97;

Larozettos v. New Jersey, 306 U. S. 451;

United States v. Cohen Grocery Co., 255 U. S. 81;

United States v. Wurzbach, 280 U. S. 396.

VIII.

The Section Regarding False Statements Requires the Application of the Two Witnesses Rule, as in Perjury Prosecutions. The Court Failed to so Instruct the Jury.

In this circuit the court has held that one witness is sufficient for the making of a false statement, but that rule was challenged in the United States Supreme Court in the case of *Gold v. United States,* 137, Oct. term, 1956, and has remained unanswered by that court. We ask the Honorable Court to re-examine the rule.

In *United States v. Levin,* 133 Fed. Supp. 88, the court said, in interpreting the Congressional intent:

> "[1] If the statute is to be construed as contended for here by the United States, the result would be far-reaching. The age-old conception of the crime of perjury would be gone. 18 U.S.C.A. §1621. Any person who failed to tell the truth to the myriad of government investigators and representatives about any matter regardless, of how trivial, whether civil or criminal, which was within the jurisdiction of a department or agency of the United States, would be guilty of a crime punishable with greater severity than that of perjury. In this case the defendant could be acquitted of the substantive charge against him and still be convicted of failing to tell the truth in an investigation growing out of that charge, even though he was not under oath. An inquiry might be made of any citizen concerning criminal cases of a minor nature, or even of civil matters of little consequence, and if he wilfully falsified his statements, it would be a violation of this statute. It is inconceivable that Congress had any such intent when this portion of the statute was enacted. A literal construction of a statute is not to be resorted to when it would bring about absurd consequences, or flagrant injustices, or produce results not intended by Congress. *Sorrells v. United States,* 287 U. S. 435, 446, 53 S. Ct. 210, 77 L. Ed. 413. The lack of this intention is clearly illustrated from the fact that numerous statutes have been passed which authorize agents of different departments and agencies of the United States to administer oaths to those from whom they are seeking information. 5 U.S.C.A. §93, authorizes an officer or clerk of any of the departments lawfully detailed to investigate frauds on, or attempts to defraud the government or

any irregularity or misconduct of any officer or agent of the United States to administer an oath to any witness called to give testimony. This authority was extended in 5 U.S.C.A. §93a. Special authority to administer oaths in the course of an investigation is given in the following statutes:

"5 U.S.C.A. §521 (Officers of Department of Agriculture who are designated by the Secretary); 5 U.S.C.A. §498 (Investigators with the Department of Interior); 7 U.S.C.A. §420 (Secretary of Agriculture or any representative authorized by him in the administration of the Cotton Futures Act, Grain Standards Act, Warehouse Act, and Standard Containers Act); 8 U.S.C. §152, now 8 U.S.C.A. §§1225(a), 1357(b) (Immigration inspectors with respect to aliens); 12 U.S.C.A. §481 (Federal Bank Examiners in examination of federal banks or affiliates thereof); 18 U.S.C.A. §4004 (Wardens, superintendents, and associates wardens of Federal Penal Institutions); 19 U.S.C.A. §1486 (Customs officer, chief assistants or any employee of the Bureau of Customs designated by the Secretary of the Treasury, or in their absence, postmasters or assistant postmasters in matters involving less than $100); 26 U.S.C.A. §§3632(a) and 3654(a) (Collector, Deputy Collector of Internal Revenue, and agents and officers making investigations); 42 U.S.C.A. §272 (Medical Quarantine Officers of United States)."

IX.

The Verdicts Are Contrary to the Law and the Evidence. The Evidence Is Insufficient to Support the Verdicts.

(a) The Acquittal of Irving Shayne on All Substantial Counts Necessarily Acquitted Him of the Conspiracy Count where the Prosecution Relies on Them to Establish the Conspiracy.

Where the conspiracy is founded upon the overt acts and the defendant is acquitted of all of the overt acts which necessarily embody the conspiracy, he is, in effect, adjudicated not guilty of the conspiracy.

Ex parte Johnson, 3 Cal. 2d 32;

Oliver v. Sup. Ct., 92 Cal. App. 94.

The principle of *res adjudicata* would also apply since the acquittal of the substantive counts which necessarily include the lesser part of conspiracy would answer the question.

Sealfon v. United States, 332 U. S. 575.

(b) Since Only the Two Defendants Were Specified in the Bill of Particulars, Acquittal of Irving Shayne Would Require Acquittal of Max Shayne on the Conspiracy Count.

One only person cannot be guilty of a conspiracy.

Gross v. United States, 136 F. 2d 875.

(c) The Statement, if False, Was Not Made by the Defendant, the Statement Was the Independent Act of the Loan Applicant.

There is no proof that the loans were not the result of the independent acts of the borrowers. They were the ones who made out the applications.

(d) The Government Failed to Produce Two Witnesses to Each Alleged "False Statement."

If, as we contend, and as we pointed out earlier in the brief two witnesses are necessary to the false statement, as contended in *Gold v. United States,* 137 October term, 1956, and *United States v. Levin,* 133 Fed. Supp. 88, then the government has failed to produce two witnesses to each alleged false statement and the evidence is insufficient.

X.

The Court Erred in Instructions Given and Refused.

(a) The Court Erred in Instructing the Jury That There Were Other "Conspirators" When the Government Had Limited the Conspiracy to the Two Defendants.

(b) The Court Erred in Failing to Instruct the Jury as to the Provisions of the Bill of Particulars.

The Court instructed the jury, contrary to the Bill of Particulars, as we pointed out in the statement of facts [R. Tr. 2452], and the prosecutor argued the same [R. Tr. 2293].

Since the Court failed to instruct the jury in accordance with the Government's own bill of Particulars, the defendants were highly prejudiced by such instruction which enlarged the case beyond the limitations.

XI.

Where It Develops That a Juror Who Sat on the Trial Had Defective Hearing and Another Went to Sleep During the Trial, a New Trial Should Have Been Granted.

The motion for a new trial should have been granted on proof (a) that one of the jurors had defective hearing, could not hear without a hearing aid and (2) that one of the jurors fell asleep during the trial and had to be awakened.

(1) One of the basic requirements of a jury trial, as guaranteed by the Sixth Amendment, United States Constitution, is qualified jurors. The duty of first selecting jurors who can hear and have no hearing defects is on the Jury Commissioner. A defendant has a right to presume that he has performed his official duty. Under the Federal Practice, jurors are interrogated by the court. Juror Sampson had defective hearing [R. Tr. 2504-2506]. He wore a hearing aid and when it was off, or the battery not working, he couldn't hear a thing. Nevertheless he was one of the jurors in this case. Discovery of his defect was not made by the defense until the close of the case so it was charged on motion for new trial. The judge denied the motion.

(2) One juror fell asleep during the trial [R. Tr. 2544]. He was awakened, and continued to sit. During the time he was asleep the case was being tried by eleven other jurors, assuming that the juror with defective hearing could be counted. If he could not, the case was being

tried by ten jurors qualified to see and hear and be awake. This was not a trial by a common law jury, as required by the Sixth Amendment, United States Constitution. The guarantee is trial by twelve jurors, who see, hear, feel, know what is going on at all times in the courtroom, and thereafter, based upon what they saw and heard, render intelligent and unanimous judgments thereon.

XII.

The Court Erred in Failing to Grant Judgments of Acquittal on the Conspiracy Count When the Jury Acquitted Irving Shayne of All the Substantive Counts. There Cannot Be a Single Conspirator.

For each of the reasons we have set forth, the Court should have granted judgments of acquittal and we ask this Court now to direct judgments of acquittal to the Court below.

Wherefore, defendants pray for reversal of each and all of the judgments and for directions to the Court below to dismiss the indictment.

Respectfully submitted,

Morris Lavine,

Attorney for Appellants.